



Ref: OPM/ 0.162 /03/2021

Date: 22/03/2021

To: Mr. Philippe Gautier
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

Dear Sir:

I have the honour of responding to your letter dated 16 March 2021 (No. 154773) in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, transmitting the text of the question put to the Federal Republic of Somalia by Judge Bennouna on 16 March 2021.

On the day the oral hearings on the merits closed, 18 March 2021, Kenya has written a further letter to the Registrar seeking to adduce new evidence in support of its claim that Somalia "acquiesced" in the delimitation of the Parties' maritime boundary along a parallel of latitude. This new evidence is in addition to the more than 4,000 pages of new evidence which Kenya filed on 5 March 2021, just 10 days before the start of the final hearing before the Court and more than two years after Kenya filed its Rejoinder.

The latest tranche of new material – which Kenya describes as a "new piece of critical evidence", which it claims to have "unearthed" for the first time on 16 March 2021 – consists of a single act of Somali domestic legislation enacted in 1984¹ ("the Mining Code"), which has long been publicly available on the internet, and five maps (four of which are already included as Annexes to Kenya's Counter-Memorial filed in

¹Somali Democratic Republic, Law No. 7 of 9 January 1984, *Approving and Containing the Mining Code* (9 Jan. 1984) (Annex 1 to Kenya's Letter of 18 March 2021).

December 2017²). This material is neither new nor critical. It provides no support whatsoever for Kenya's acquiescence argument.

Kenya's claim that Somalia "suppress[ed]" the Mining Code, which Kenya only managed to "unearth" the day Somalia concluded its oral presentations to the Court, is

wholly unjustified. The Mining Code is published legislation which is available on the internet and easily discoverable via a simple Google search, or by a review of websites listing African mining legislation.³ The Code is referred to in publicly available books and reports,⁴ including at least one document in the materials Kenya filed on 5 March 2021.⁵ Somalia has not sought – nor would it have any conceivable reason to seek – to "suppress" this piece of publicly available legislation which, for the reasons set out below, is entirely irrelevant to the issues before the Court.

First, the Mining Code and the maps (re-)submitted by Kenya cannot and do not support Kenya's argument that the Parties have delimited their maritime boundary through a process of unilateral assertion by Kenya and acquiescence by Somalia. In *Ghana v. Côte d'Ivoire*, Ghana relied on "oil concession maps established by both private and public sources" in support of its argument that the States had delimited their maritime boundary through a tacit agreement. The Special Chamber rejected that argument, observing that "none of these maps is able to define authoritatively a maritime boundary in the area concerned".⁶ The Special Chamber expressed considerable doubt as to whether the States' oil concession practice could have any bearing on the delimitation of their maritime boundary:

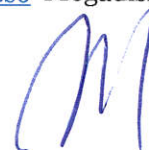
²See Somali Concession Blocks for the year 1978. KCM, Vol. II, Figure 1-20; Somali Concession Blocks for the year 1986. KCM, Vol. II, Figure 1-21; Map of the Oil and Gas Activities in Somalia (adopted from Deloitte, 2009). KCM, Vol. II, Figure 1-28; Somali Republic Concessions and Key 1988 Wells. KCM, Vol. II, Figure 1-35.

³ For example, the African Mining Legislation Atlas enables anyone to download a copy of the Law and explains that: "*The primary mining code of Somalia is the Mining Law of 1984. It regulates and governs the conduct of all mining operations and related activities within the territory of the Republic of Somalia*". African Mining Legislation Atlas, "Summary: Somalia" (last updated 12 May 2019), available at <https://www.aml.org/countries/44?name=Somalia> (emphasis added).

⁴See, e.g., Ibibia Lucky Worika, *Environmental Law & Policy of Petroleum Development* (2002), p. 103; Abubakar Mohamud, "Environmental regulation of emerging offshore oil and gas activities in Somalia" in *WORLD MARITIME UNIVERSITY DISSERTATIONS* 1133 (2019), p. 48.

⁵See *Project Compliance Report, Democratic Republic of Somalia, Petroleum Exploration Promotion Project* (Credit 1043-SO), Report No. 7533, The World Bank (8 Dec. 1988). Appendix 2 to Kenya's 22 February 2021 Application, Annex 44, para. 1.03. ("The Mining Code of 1970 and its regulations of 1971 governed petroleum exploration and production until limited amendments to the Mining Code were promulgated in the form of a new Mining Code dated January 9, 1984.")

⁶*Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 148.



"The Special Chamber would further like to point out that it has doubts as to whether the practice linked to the oil activities of the Parties might be sufficient to establish a single maritime boundary for the territorial sea, the exclusive economic zone and the continental shelf within and beyond 200 nm. Offshore oil activities take place on the seabed of the territorial sea and the continental shelf. The legal regime covering such activities does not have recourse to the sovereign rights of the coastal State concerned over, for example, the water column above the continental shelf within 200 nm. Furthermore, the Special Chamber notes that the oil

activities of the Parties have taken place at a distance of much less than 200 nm from the baseline. Therefore, it is doubtful how such activities could have a bearing upon the delimitation of the continental shelf within and beyond 200 nm".⁷

These observations apply *a fortiori* to Kenya's reliance on Somalia's oil concession practice in support of its case that the Parties delimited their maritime boundary through a process of unilateral assertion and acquiescence.

In addition to oil concession maps, in *Ghana v. Côte d'Ivoire* Ghana also sought to rely on provisions of national legislation to support its case concerning the existence of a tacit agreement. Again, the ITLOS Special Chamber rejected that attempt. After observing that, "national legislation, as a unilateral act of a State, is of limited relevance to proving the existence of an agreed maritime boundary", the Special Chamber dismissed the relevance of Cote d'Ivoire's domestic legislation, as the legislation "dealt with a concession on oil activities, not with the establishment of a boundary in the territorial sea".⁸ The same is true of Somalia's Mining Code, which does not purport to establish any terrestrial or maritime boundaries.⁹

Second, and in any event, even if (*quod non*) Somalia's domestic legislation concerning oil concessions was legally capable of bearing upon the delimitation of the Parties' maritime boundary, the content of the Mining Code cannot provide any support for Kenya's case that Somalia acquiesced in the delimitation of a maritime boundary along a parallel of latitude. Kenya relies on Article 58 of the Mining Code (although it

⁷ *Ibid.*, para. 149.

⁸ *Ibid.*, para. 163.

⁹ Indeed, this the fact that the Mining Code was not intended to establish any such boundary is made explicit by Article 2(1)(b) of the Mining Code, which refers to "the territorial sea *as determined by the relevant legislation in force from time to time*". Somali Democratic Republic, Law No. 7 of 9 January 1984, *Approving and Containing the Mining Code* (9 Jan. 1984) (Annex III to Kenya's Letter of 18 March 2021) (emphasis added).



does not accurately quote the terms of that Article in its letter to the Court). Article 58 provides:

“For the purpose of awarding areas pursuant to this Part, the areas of the Republic referred to in Article 2 hereof shall be divided into blocks, according to a grid system, determined in accordance with rules to be prescribed by the Minister. Blocks must be of a rectangular shape with two of their sides oriented in the northsouth direction, except where the borders of the Republic, other natural boundaries or the boundaries of other areas which are currently subject to a permit or lease, prevent it”.¹⁰

Article 58 does no more than mandate that Somalia’s territory and territorial sea shall be divided into rectangular licensing blocks, two of the four sides of which must follow a “northsouth” (i.e., vertical) line, unless this was rendered impossible by Somalia’s territorial borders or other natural or licensing boundaries. It follows that the other two sides of each concession block must follow a horizontal line in all circumstances. This is obviously not because such horizontal lines align with Somalia’s land or maritime boundaries (which do not follow such lines) but simply because this was conducive to the clear establishment, definition and management of the concession blocks. Nothing in the Mining Law purports to determine or reflect the limits of the territorial sea (still less the EEZ or continental shelf, which are not referred to anywhere in the legislation).

Third, Kenya’s argument that the Mining Code supports an inference that the charts appended to the Somali Maritime Law of 1988 must have shown a maritime boundary along a parallel of latitude is without merit. As Somalia has explained, despite extensive and diligent searches it has not been possible to locate a copy of the charts appended to the Somali Maritime Law, which are presumed to have been lost or destroyed during Somalia’s long civil war.¹¹ However, the wording of the Somali Maritime Law is fully consistent with an equidistance line, and rather obviously inconsistent with a parallel of latitude.¹² There is no suggestion that any of the maps enclosed with Kenya’s letter – none of which purports to show the location of the Parties’ maritime boundary – were based on, or intended to reflect, the missing charts. Neither the terms of the Mining Code, nor the maps enclosed with Kenya’s letter, support Kenya’s claim that the missing charts showed a parallel maritime boundary.

¹⁰ Somali Democratic Republic, Law No. 7 of 9 January 1984, *Approving and Containing the Mining Code* (9 Jan. 1984), Art. 58.

¹¹ Memorial of Somalia (hereinafter “MS”), Vol. I, para. 3.6, fn. 62.

¹² Reply of Somalia (hereinafter “SR”), Vol. I, para. 2.99.



Fourth and in any event, the argument which Kenya seeks to advance on the basis of the Mining Code and the maps enclosed with its letter to the Court remains in fundamental conflict with:

- Kenya's previous statements to the Court¹³ and to the Commission on the Limits of the Continental Shelf¹⁴ on the status of the Parties' maritime boundary;
- The terms of the Memorandum of Understanding signed by Kenya and Somalia in April 2009;¹⁵
- Kenya's own domestic legislation enacted in 1972 and 1989, which expressly stipulates that (i) the Parties' maritime boundary in the territorial sea follows a "median line every point of which is equidistant" from the relevant basepoints,
- and (ii) the Parties' maritime boundary in the EEZ shall be delimited pursuant to a future agreement between Kenya and Somalia;¹⁶
- The maritime boundary negotiations between Kenya and Somalia in 2013 and 2014;¹⁷
- Kenya's own practice regarding oil concessions, which is reflected in numerous maps showing that between 1978 the late 1990s (i.e., the period during which the Mining Code was enacted) Kenya granted concession blocks whose northernmost boundaries consistently respected an equidistance line;¹⁸ and
- The various official maps published by Kenya between 1979 and 2003 which consistently showed an equidistant maritime boundary in the territorial sea.¹⁹

¹³SeeSR, Vol. I, paras. 2.15-2.21; CR 2021/1, pp. 40-41, paras. 12-18 (Sands).

¹⁴SeeSR, Vol. I, paras. 2.26-2.29; CR 2021/1, pp. 41-42, paras. 19-22 (Sands).

¹⁵SeeSR, Vol. I, para. 2.22-2.25; CR 2021/1, pp. 38-39, paras. 6-11 (Sands).

¹⁶SeeSR, Vol. I, para.2.36, fn. 60; Republic of Kenya, Law No. 2 of 1972, *Territorial Waters Act* (16 May 1972), § 2(4). MS, Vol. III, Annex 16; Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), § 4(4). MS, Vol. III, Annex 20 (quoted in KCM, para. 79); CR 2021/1, pp. 44-46, paras.29-33(Sands).

¹⁷SeeSR, Vol. I, paras. 2.31-2.33; CR 2021/1, pp. 42-43, paras. 23-28 (Sands).

¹⁸SR, Vol I, paras. 2.74-2.78. See MS, Vol. II, Annexes M2-M7; Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1979* (Feb. 1980). MS, Vol. II, Annex M2; Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1982* (Jan. 1983). MS, Vol. II, Annex M3; Petroconsultants S.A., *Kenya: Synopsis 1984* (Jan. 1985). MS, Vol. II, Annex M4; Petroconsultants S.A., *Kenya: Synopsis 1985 (Including Current Activity)* (Apr. 1986). MS, Vol. II, Annex M5; Petroconsultants S.A., *Kenya: Synopsis 1994* (Jan. 1995). MS, Vol. II, Annex M6; Petroconsultants S.A., *Kenya: Synopsis 1995* (July 1996). MS. Vol. II, Annex M7; Petroconsultants S.A., *Kenya: Current Status and Synopsis 1996* (June 1997). MS. Vol. II, Annex M8; CR 2021/1, pp. 50, para. 48 (Sands).

¹⁹SeeSR, Vol. I, paras.2.82-2.86; Republic of Kenya, Ministry of Agriculture, *Exploratory Soil Map of Kenya* (1980). SR, Vol. II, Annex 6; National Oil Corporation of Kenya, *Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report* (1995). KCM, Vol. II, Annex 38; Republic of



Accordingly, the Mining Code and the maps (re-)submitted by Kenya are not new or "critical" and are of no probative value in support of Kenya's "acquiescence" argument. That argument remains entirely devoid of any legal or factual merit.

Please accept, Sir, renewed assurances of my highest consideration.

Sincerely,



H.E. Mahdi Mohammed Gulaid
Deputy Prime Minister
Agent
Federal Republic of Somalia

Kenya, Survey of Kenya, NATIONAL ATLAS OF KENYA (5th ed., 2003), pp. 66, 69. SR, Vol. II, Annex 7; CR 2021/1, p. 50, paras. 49-50 (Sands).